Supreme Court, U.S.
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No. 98-1690

In The

Supreme Court of the United States

CYNTHIA A. FELLENCER,

Petitioner,

v.

PENOBSCOT NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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518

QUESTION PRESENTED FOR REVIEW

Whether a decision of the Penobscot Nation about whom to employ as its Community Health Nurse at the Penobscot Indian Reservation to deliver governmental health services to tribal members is an "internal tribal matter," protected by the Maine Indian Claims Settlement Act of 1980 from state regulation in state court pursuant to the Maine Human Rights Act.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

STATEMENT OF JURISDICTION 6

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 7

I. BACKGROUND 7

A. The "Internal Tribal Matters" Provision ... 7

B. The First Circuit's Decision in *Akins v. Penobscot Nation* 9

C. The First Circuit's Decision in *Penobscot Nation v. Fellencer* 10

II. DIFFERENCES BETWEEN THE FIRST CIRCUIT'S DECISIONS IN *AKINS* AND *FELLENCER*, ON THE ONE HAND, AND THE MAINE SUPREME JUDICIAL COURT'S DECISION IN *PENOBSCOT NATION V. STILPHEN*, ON THE OTHER, DO NOT WARRANT GRANTING A WRIT OF CERTIORARI 11

III. THE FIRST CIRCUIT'S DECISION HAS NO SIGNIFICANCE BEYOND MAINE 16

CONCLUSION 19

APPENDICES:

Affidavit of Mark Mitchell 1a

Affidavit of Carl G. Mitchell 3a

TABLE OF CONTENTS – Continued

Page

Penobscot Nation's Responses to Interrogatories 25, 40, 41, 42 Propounded by Plaintiff (Fellencer v. Penobscot Nation, Maine Superior Court, Penobscot County, CV-95-275) 5a

Charge of Discrimination (Maine Human Rights Commission, E94-0730) 9a

Maine Attorney General Opinion 84-22 (July 25, 1984) 10a

TABLE OF AUTHORITIES

Page

CASES

Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997) 6, 9, 10, 11, 15

Bryan v. Itasca County, 426 U.S. 373 (1976) 18

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 18

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) 18

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 7

Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999) 6, 10, 11, 12, 15, 16

Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983), *appeal dismissed*, 464 U.S. 923 (1983) .... *passim*

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 18

STATUTES

25 U.S.C.A. §§ 450-450n 2, 3

25 U.S.C.A. § 450(a) 2

25 U.S.C.A. § 1302(8) 17

25 U.S.C.A. § 1601 3

25 U.S.C.A. §§ 1601-1683 2

25 U.S.C.A. § 1616 14

25 U.S.C.A. §§ 1721-1735 1

25 U.S.C.A. § 1725(b)(1) 1, 7

25 U.S.C.A. § 1725(i) 1

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C.A. § 1735(a) 1

28 U.S.C.A. § 1254(1) 6

28 U.S.C.A. § 1291 6

28 U.S.C.A. § 1331 6

28 U.S.C.A. § 1360 18

28 U.S.C.A. § 1362 6

42 U.S.C.A. § 2000e(b) 19

42 U.S.C.A. § 2000e-2(i) 19

5 M.R.S.A. §§ 4551-4632 5

30 M.R.S.A. §§ 6201-6214 1

30 M.R.S.A. § 6206(1) 1, 7

1979 Me. Laws c. 732 § 31 15

REGULATIONS

25 C.F.R. § 900.3(b)(1) 14

25 C.F.R. § 900.3(b)(3) 14

25 C.F.R. § 900.3(b)(7) 14

OTHER AUTHORITIES

CONSTITUTIONS

U.S. Const. art. I, § 8, cl. 3 ..... 7, 15

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

S. Rep. No. 957, 96th Cong., 2d Sess. (1980).....8, 15

H.R. Rep. No. 1353, 96th Cong., 2d Sess. (1980)..... 8

BOOKS

Indian Labor Force Report: Portrait 1997 (Washington, D.C., Bureau of Indian Affairs, 1999).....16, 17

STATUTES INVOLVED

The Maine Indian Claims Settlement Act of 1980, 25 U.S.C.A. §§ 1721-1735 (West 1983) (the "Settlement Act"), provides: "[t]he Passamaquoddy Tribe [and] the Penobscot Nation . . . shall be subject to the civil and criminal jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act. . . . " 25 U.S.C.A. § 1725(b)(1) (West 1983).

The Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. §§ 6201-6214 (West 1996 & Supp. 1998-99) (the "Maine Implementing Act"), provides that "the Passamaquoddy Tribe and the Penobscot Nation- . . . shall be subject to the laws of the State, *provided however, that internal tribal matters,* including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State.*" 30 M.R.S.A. § 6206(1) (West 1996) (emphasis added).

The Maine Indian Claims Settlement Act of 1980 further provides that "the Penobscot Nation . . . shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes . . . to the same extent and subject to the same criteria generally applicable to other Indians, Indian nations or tribes. . . . ," 25 U.S.C.A. § 1725(i) (West 1983), and "in the event a conflict of interpretation between the provisions of the Maine Implementing Act and this subchapter should emerge, the provisions of this subchapter shall govern," 25 U.S.C.A. § 1735(a) (West 1983).

The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §§ 450-450n (West 1983 & Supp. 1999) (the "Indian Self-Determination Act"), provides, in pertinent part:

> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.

25 U.S.C.A. § 450(a) (West 1983).

The Indian Health Care Improvement Act of 1976, *as amended*, 25 U.S.C.A. §§ 1601-1683 (West 1983 & Supp. 1999), provides, in pertinent part:

> (a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.
>
> (b) A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level

> and *to encourage the maximum participation of Indians in the planning and management of those services. . . .*
>
> . . . .
>
> (d) . . . [T]he unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States.

25 U.S.C.A. § 1601 (West 1983 & Supp. 1999) (emphasis added).

The Indian Self-Determination Act further provides, in pertinent part, that "[a]ny contract, subcontract, grant, or subgrant pursuant to this subchapter . . . or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians. . . . " 25 U.S.C.A. § 450e(b)(1) (West Supp. 1999).

STATEMENT OF THE CASE

Pursuant to a January 12, 1993 vote of the Penobscot Nation Tribal Council, the Penobscot Nation's governing body, the Penobscot Nation (the "Nation" or the "Tribe") hired Petitioner as its Community Health Nurse/Diabetes Program Coordinator ("Community Health Nurse") to serve in its Health Department. Appendix ("App.") at 1a. Petitioner's job consisted of administering the Tribe's

governmental health services to the reservation community, including treatment and health education of tribal members. Appendix to Petition ("P.App.") at 65a-66a. Although Petitioner is not Native American, her job description listed "Native American Preference" and "experience in dealing with elders" as "minimum qualifications." *Id.* at 67a. Her duties included supervising the provision of "home health care to members of the Penobscot community," coordinating the "Diabetes Interdisciplinary Team" and the "annual IHS [Indian Health Services] site visits for the Diabetes Project," serving as a member of the "Maternal & Child Health Team" and the "Child Protective Team," and functioning as the "AIDS Prevention Coordinator." *Id.* at 65a-67a.

The Penobscot Nation Health Department, which runs the Penobscot Nation Health Clinic, is a governmental department of the Nation. App. at 1a, 3a. The Health Clinic was created in 1978 with funding provided to the Tribe under a contract with the United States Indian Health Services ("IHS") pursuant to the Indian Self-Determination Act. *Id.* at 3a, 6a-7a. The Community Health Nurse position was one of the original jobs funded under the Nation's first IHS contract, and was first held by Penobscot tribal member Ruth Davis, after whom the Nation's Health Clinic is named. *Id.* at 7a. Throughout Petitioner's employment at the Tribe, the Penobscot Nation Health Department, including Petitioner's position as Community Health Nurse, continued to be funded under a contract with IHS pursuant to the Indian Self-Determination Act. *Id.* at 6a-7a.

After receiving complaints concerning Petitioner's treatment of elder tribal members, the Penobscot Nation

Tribal Council voted to terminate her employment, effective September 30, 1994. *Id.* at 1a, 3a, 5a. Petitioner then filed a Charge of Discrimination with the Maine Human Rights Commission ("MHRC"), asserting that the Tribe had engaged in race and national origin discrimination by giving preference to Native Americans over her. *Id.* at 9a. On January 20, 1995, the MHRC dismissed Petitioner's claims, citing its "lack of jurisdiction in matters involving employment by Tribal government" under the long-standing Opinion of the Maine Attorney General. P.App. at 55a-59a.[1]

Petitioner subsequently filed an action in the Maine Superior Court against the Nation, claiming race and/or national origin discrimination under the Maine Human Rights Act, 5 M.R.S.A. §§ 4551-4632 (West 1989 & Supp. 1998-99) (the "MHRA"). *Petition* at 5. The Nation moved to dismiss on the ground that such a claim imposed state law upon the Tribe's "internal tribal matters" in violation of the Settlement Act. Exhibit 11 to First Circuit Record Item ("R. No.") 12. The Maine Superior Court denied the Tribe's motion (as well as a subsequent motion for reconsideration) and ordered the Nation to submit to state court procedures and discovery. Exhibit 13 to R. No. 12. On October 20, 1997, the Nation brought an action in the United States District Court, seeking declaratory and injunctive relief to enforce its Settlement Act right to be free from state regulation over its internal tribal matters. R. No. 1. As a result, the Maine Superior Court stayed its proceedings. Exhibit 19 to R. No. 12.

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[1] The Maine Attorney General Opinion is set forth in the Appendix. App. at 10a-14a.

With the support of the United States of America as *amicus curiae*, the Nation filed a motion for summary judgment, and Petitioner cross-moved for summary judgment. R. Nos. 11-13, 15. On March 13, 1998, the district court entered judgment in favor of Petitioner, holding that the tribal government's personnel decision with regard to its Community Health Nurse did not invoke the right of the Tribe to organize or govern itself and therefore was not an internal tribal matter. P.App. at 37a . The Nation timely appealed the district court's judgment to the United States Court of Appeals for the First Circuit. R. No. 21. On January 19, 1999, a unanimous panel of the First Circuit reversed. Tracking considerations outlined in its prior decision, *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997), and reviewing Congress's recognition of the importance of community health care for the integrity of Indian communities, the First Circuit held that the Nation's employment decision concerning Petitioner was an "internal tribal matter." *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999). P.App. at 1a-17a.

STATEMENT OF JURISDICTION

Subject matter jurisdiction rested in the district court pursuant to 28 U.S.C. § 1362 (Indian tribes) and 28 U.S.C. § 1331 (federal question). The First Circuit's jurisdiction was based upon 28 U.S.C. § 1291. Petitioner seeks a writ of certiorari from this Court pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

The question presented in this case has no implications beyond the State of Maine, is confined to the facts of this case, and is distinct from the legal issue presented in *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983), *appeal dismissed*, 464 U.S. 923 (1983). There is no fundamental principle of federal law at stake in conflicting decisions to warrant issuance of a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. BACKGROUND

A. The "Internal Tribal Matters" Provision:

The Constitution vests Congress with plenary authority over Indian affairs. U.S. Const. art. I, § 8, cl. 3; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). In 1980, Congress enacted the Maine Indian Claims Settlement Act, and authorized state jurisdiction over the Penobscot Nation and the Passamaquoddy Tribe, with the limitation that "internal tribal matters, including tribal organization [and] tribal government . . . *shall not be subject to regulation by the State.*" 25 U.S.C.A. § 1725(b)(1), *ratifying* 30 M.R.S.A. § 6206(1) (emphasis added) (the "internal tribal matters provision"). The final Committee Reports of both the House and the Senate assuaged the Penobscot Nation's fears that this provision would destroy its sovereignty:

> Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed

> laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory . . . , in keeping with these decisions *the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs.* Thus, rather than destroying the sovereignty of the tribes, *by recognizing their power to control their internal affairs* and by withdrawing the power which Maine previously claimed to interfere in such matters, *the settlement strengthens the sovereignty of the Maine Tribes.*

S. Rep. No. 957, 96th Cong., 2d Sess., at 14 (1980); H.R. Rep. No. 1353, 96th Cong., 2d Sess., at 14-15 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3790 (emphasis added). The Senate Report further stated that the Settlement Act recognized "the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." S. Rep. No. 957 at 29 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

B. The First Circuit's Decision in *Akins v. Penobscot Nation*:

In *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997), the First Circuit addressed what constitutes an "internal tribal matter" under the Settlement Act. Andrew Akins, a member of the Penobscot Nation, brought an action in federal district court against the Tribe, seeking to strike down a tribal policy concerning the harvesting of timber on tribal lands. The tribal timber regulation restricted logging permits to tribal members who resided in Maine. Akins claimed that it was enacted to discriminate against him as a non-resident and should be stricken under state and federal laws. The Penobscot Nation argued, *inter alia*, that its timber policy was an "internal tribal matter," and, therefore, not subject to review under state law. *See id.* at 484.

Recognizing that the Tribe's attempt to govern a matter could not, by itself, make it an "internal tribal matter," the First Circuit decided that the listed statutory exemplars (e.g. "tribal government" and "tribal organization") were not helpful in resolving the question before it. Writing narrowly for the particular problem presented, the court found five considerations helpful to its decision: whether the tribal regulation was confined to Indian territory, whether it addressed tribal resources, whether it affected state interests, whether it regulated non-members, and whether prior legal understandings supported treating the regulation as an internal tribal matter, free from state jurisdiction. *Akins*, 130 F.3d at 488-90. Weighing these factors together, the First Circuit held that the

Tribe's timber regulation was an "internal tribal matter" and not subject to review under state law. *Id.* at 489-90.

C. The First Circuit's Decision in *Penobscot Nation v. Fellencer*:

In *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), the First Circuit repeated that it had not offered the five considerations in *Akins* "as an essential test for determining which tribal actions constitute 'internal tribal matters.' " It further stated:

> [W]e do not offer them now for that purpose. Instead, we use the *Akins* considerations as one source of guidance in resolving this case. And, in the spirit of *Akins*, we consider another pertinent factor, the nature of the position involved in this case.
>
> Evaluating all of these considerations, with particular emphasis on the interest of the State of Maine, prior legal understandings, and the nature of Fellencer's position, we conclude that the decision of the Nation to terminate Fellencer's employment was an "internal tribal matter."

Fellencer, 164 F.3d at 709-10. P.App. at 8a-9a.

* * *

Petitioner seeks a writ of certiorari, claiming: (1) that these narrowly drawn decisions of the First Circuit generate an intractable conflict with the Maine Supreme Judicial Court's decision in *Penobscot Nation v. Stilphen*, *supra* and (2) that the issue presented by the First Circuit's *Fellencer* decision is one of national significance. As set

forth below, the differences between the First Circuit approach and that of the Maine Supreme Judicial Court do not warrant granting the writ, and Petitioner's assertion that the issue presented has national significance is without merit.

II. DIFFERENCES BETWEEN THE FIRST CIRCUIT'S DECISIONS IN *AKINS* AND *FELLENCER*, ON THE ONE HAND, AND THE MAINE SUPREME JUDICIAL COURT'S DECISION IN *PENOBSCOT NATION V. STILPHEN*, ON THE OTHER, DO NOT WARRANT GRANTING A WRIT OF CERTIORARI.

While the First Circuit in *Akins*, and now in *Fellencer*, has taken a different approach to the construction of the "internal tribal matters" provision than that of the Maine Supreme Judicial Court in *Stilphen*, a writ of certiorari is not warranted on that basis. In both cases, the First Circuit faced distinct facts and a different legal issue than that in *Stilphen*. Indeed, in *Fellencer*, the First Circuit carefully distinguished *Stilphen*:

> Although Fellencer, unlike Akins, is not a member of the Nation, and hence the effect of the decision at issue is not limited to tribal members, the decision to terminate Fellencer as the community health nurse affects many tribal members but only one non-tribal member (Fellencer). This limited impact beyond the Nation distinguishes this case from *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983), wherein the Maine Supreme Judicial Court held that a 'beano' game, a tribal enterprise designed to involve many non-tribal members, did not become an "internal tribal matter" simply

> because an Indian tribe funded government services with beano game's profits. *See id.* at 486. Holding that the public gambling events were "related to tribal self-government only because of the use to which its profits are put," the *Stilphen* Court held that the tribe had no "inherent right to 'market an exemption from state taxation' to the public." *Id.* (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)). The "beano" games in *Stilphen* were designed to "draw many hundreds of players to the Penobscot reservation from all over Maine and beyond." *Stilphen*, 461 A.2d at 480. Here the employment decision has its immediate effect only on one non-tribal member.

Fellencer, 164 F.2d at 710. P.App. at 9a.

Not only is *Stilphen* factually distinct from the case at bar, but it supports the same result. As the 1986 Maine Attorney General Opinion stated, under *Stilphen*, a decision by tribal government about who will or will not be an employee of the Tribe at the Penobscot Reservation is an integral aspect of tribal government and therefore an "internal tribal matter." *See* Maine Attorney General Opinion No. 84-22 (July 25, 1986), App. at 10a-14a. Reasoning from the *Stilphen* Court's holding that fundamental aspects of tribal government are "internal tribal matters," the Maine Attorney General concluded:

> Subjecting employment decisions of the Penobscot Nation to the jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result

> clearly not intended by the Maine Indian Settlement Act. *Accordingly, . . . decisions of the Penobscot Nation, as to who will be employed by the tribal government, are "internal tribal matters" not subject to regulation by the State and, therefore, not within the jurisdiction of the Maine Human Rights Commission.*

App. at 14a (emphasis added).

The integral relationship between tribal government and the Penobscot Nation's decision to discharge Petitioner from the Penobscot Nation Health Department is further reinforced by the First Circuit's discussion of the statutory origins of Petitioner's position:

> The community nurse position from which Fellencer was dismissed is funded by the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. § 450 et seq. Congress therein declared its policy to "respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities." 25 U.S.C. § 450a(a); *see also* S.Rep. No. 102-392, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. at 3949 (1992 amendments to Indian Health Care Improvement Act) ("health care provided by people of one's own culture is the most appropriate, and results in better utilization of health care services"). Believing that the administration of such services by Indians was "crucial to the realization of self-government," 25 U.S.C. § 450(a)(1), Congress included an employment preference for Indians in the legislation. 25 U.S.C. § 450e(b) (requiring that "preferences and

> opportunities for training and employment . . . shall be given to Indians").

Id. at 713. P.App. at 14a-15a.[2] Thus, applying the *Stilphen* test for an "internal tribal matter" (i.e. whether the matter is a fundamental aspect of tribal government or tribal organization), the Penobscot Nation's decision about whom to employ as its Community Health Nurse surely meets the test.[3]

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[2] Regulations for the administration of IHS, including the Nation's Community Health Nurse, further declare the intent of the Secretary of Health and Human Services to: "remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs," 25 C.F.R. § 900.3(b)(1); support tribal health programs that "meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs," *id.* § 900.3(b)(3); "assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities," *id.* § 900.3(b)(7); and "work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality," *id.* Community Health Representatives at federal Indian reservations must be trained and supervised by the IHS to give "appropriate consideration" to "lifestyle factors that have an impact on Indian health status" and "promote traditional health care practices of the Indian tribes served consistent with the Service standards." 25 U.S.C.A. § 1616 (West 1983).

[3] As the United States pointed out in its *amicus* brief to the district court, Petitioner's MHRA claim in the state court directly imposes state regulation upon the Penobscot Tribal Council's governmental decision. R. No. 13 at 6. The very nature

Finally, the *Stilphen* Court, unlike the First Circuit in *Akins* and *Fellencer*, did not squarely address the construction of the "internal tribal matters" provision as a question of federal law. Although it considered, but was not persuaded by, federal Indian common law in its application of the internal tribal matters provision to the facts before it, the *Stilphen* Court ultimately construed the provision as if it were a part of an ordinary state statute. *See Stilphen*, 461 A.2d at 489 (looking to "*the* statute itself [the Maine Implementing Act] and *its* legislative history" to construe the provision) (emphasis added). The *Stilphen* Court did not consider Congress's intent in ratifying the provision; notwithstanding the fact that such ratification was the *sine qua non* for rendering it effective. *See* U.S. Const. art. I, § 8, cl. 3. *See also* 1979 Me. Laws c. 732 § 31 (Maine Implementing Act effective only upon federal approval). Thus, since the Maine Supreme Judicial Court has yet to squarely render a holding on the internal tribal matters provision as a question of federal law, there is no fundamental conflict on a question of federal law between the First Circuit and the Maine Supreme Judicial Court to warrant granting the writ.

For all of these reasons, differences between the First Circuit approach to construing "internal tribal matters"

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of Petitioner's cause of action would require state law scrutiny of a tribal government decision, contrary to Congress's intent that non-Indians be excluded from such decision-making. *Id.* (quoting S. Rep. No. 957, *supra* at 15).

and that of the *Stilphen* Court do not warrant granting a writ of certiorari.[4]

III. THE FIRST CIRCUIT'S DECISION HAS NO SIGNIFICANCE BEYOND MAINE.

Petitioner makes two arguments under the general assertion that the *Fellencer* case has national significance. First, Petitioner asserts that the First Circuit's decision failed to adequately consider the interest of the State of Maine in applying the MHRA "uniformly to all employers in the State." *Petition* at 12. Second, Petitioner asserts that the issue presented is one of national significance: whether the employment decisions of federally recognized sovereign Indian tribes "should be open to challenge in state court on the basis of a state's anti-discrimination laws." *Petition* at 13. The Penobscot Nation addresses each argument in turn.[5]

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[4] As an afterthought, Petitioner states that the "procedural posture" of this case should warrant granting a writ of certiorari. *Petition* at 10. Petitioner never challenged the procedural posture of the case in the First Circuit and fails to present any issue for review in this regard. *See Petition* at i ("Question Presented for Review"). Such an ill-defined, unpreserved argument cannot serve as the basis for granting a writ of certiorari.

[5] The Nation notes that Petitioner attempts to bolster her "national significance" argument by suggesting that Indian tribes are thriving entrepreneurial communities. *E.g. Petition* at 4. Unfortunately, this is grossly inaccurate. As the United States Department of the Interior's recent *Indian Labor Force Report* shows, as of 1997, "[h]alf of the work force in Indian Country remained unemployed" and "[o]f the 378,853 adult Indians who were employed in 1997, 30 percent (113,904) were still living

Petitioner's assertion that the First Circuit's decision harms an interest of the State of Maine to uniformly enforce the MHRA across all employers, of course, has nothing do to with anything beyond Maine. In any event, it fails to recognize that the State of Maine, through its Attorney General and MHRC, has long viewed the employment decisions of the Penobscot Nation and the Passamaquoddy Tribe as "internal tribal matters," and, therefore, not subject to the MHRA. App. at 14a & n.3. Thus, uniform enforcement of the MHRA, by the very state agency charged with its enforcement, stops at the employment decisions of these Indian tribes. Beyond this, Petitioner should not now be heard to assert that the State of Maine must be able to apply the MHRA "uniformly to all employers in the State" when Petitioner conceded to the First Circuit that "employment decisions concerning upper level tribal employees, such has heads of departments, might plausibly be viewed as fitting within the categories of 'tribal government' or 'tribal organization.' " Brief of Appellee to the First Circuit at 5 n.1. The First Circuit properly considered the interest of the State of Maine in reaching its decision, and there is no "clash of fundamental values at stake within the State's borders," *Petition* at 12.[6]

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below poverty guidelines established by Health and Human Services." United States Department of the Interior, Bureau of Indian Affairs, Office of Tribal Services, *Indian Labor Force Report: Portrait 1997*, at iii (Washington, D.C., Bureau of Indian Affairs, 1999).

[6] Notably, Petitioner has chosen not to bring her claims of race and national origin discrimination in the Penobscot Nation Tribal Court pursuant to the equal protection provisions of the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1302(8) (West 1983).

Petitioner's statement that this case has national significance is wrong. As a practical matter, employment discrimination lawsuits against federal Indian tribes, outside of tribal forums, would be extremely rare. This is because, absent an express waiver by Congress or the particular tribe, federal Indian tribes have sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Likewise, absent an express grant of authority from Congress, states generally lack civil regulatory authority over the reservation activities of federal Indian tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 214-15 (1987); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973). "Public Law 280," 28 U.S.C.A. § 1360 (West 1993), provides, in reference to six States, that "those civil laws of such State that are of general application to private persons . . . shall have the same force and effect within . . . Indian country as they have elsewhere within the State." But in *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court unanimously held that Public Law 280 does not give those states civil regulatory jurisdiction over the reservation affairs of tribal governments and tribal members. *Id.* at 388-89. Rather, Public Law 280 provides only for state court adjudication of private-party disputes (e.g. torts and contracts) between Indian parties or between Indians and non-Indians. *Id.* at 383-84. It does not apply to federal Indian tribes. *See id.* at 388-89. Thus, absent a unique grant of state authority over Indian tribes (and none are cited by Petitioner), the question of whether a federally

recognized Indian tribe would be subject to state employment discrimination claims in a state court simply will not arise.[7]

CONCLUSION

For all of the above reasons, this Court should deny the Petition for Writ of Certiorari.

Dated: May 20, 1999

Respectfully submitted,

KAIGHN SMITH, JR., Esq.
Counsel of Record
DRUMMOND, WOODSUM & MACMAHON
245 Commercial St.
Portland, Maine 04101
207-772-1941
Counsel for Penobscot Nation

[7] Of course, there is nothing novel about federal Indian tribes' immunity from employment discrimination laws. Congress expressly excluded tribal employment from Title VII of the Civil Rights Act of 1964. 42 U.S.C.A. § 2000e(b) (West 1994) (term "employer" does not include Indian tribes). *See also id.* § 2000e-2(i) (employment practices giving preference to Indians employed in businesses on or near reservations excluded from Title VII).

APPENDIX

APPENDIX

TABLE OF CONTENTS

Page

Affidavit of Mark Mitchell 1a

Affidavit of Carl G. Mitchell 3a

Penobscot Nation's Responses to Interrogatories 25, 40, 41, 42 Propounded by Plaintiff (Fellencer v. Penobscot Nation, Maine Superior Court, Penobscot County, CV-95-275) 5a

Charge of Discrimination (Maine Human Rights Commission, E94-0730) 9a

Maine Attorney General Opinion 84-22 (July 25, 1984) 10a

AFFIDAVIT OF MARK MITCHELL

Now comes Mark Mitchell, who states, under oath, as follows:

1. My name is Mark Mitchell. I am a member of the Penobscot Nation (the "Tribe"), and I served on the Penobscot Nation Tribal Council at all times during the course of Cynthia Fellencer's employment as Community Health Nurse/Diabetes Coordinator at the Penobscot Nation Health Department.

2. The Tribal Council approved the employment of Cynthia Fellencer as Community Health Nurse/Diabetes Coordinator within the Penobscot Nation's Health Department on January 12, 1993.

3. The Penobscot Nation Health Department is a governmental department of the Penobscot Nation.

4. At all times during the course of her employment by the Penobscot Nation, Cynthia Fellencer was an employee of the Penobscot Nation Tribal Government, subject to the authority and control of the Penobscot Nation Tribal Council.

5. At all times during the course of her employment by the Penobscot Nation, Cynthia Fellencer was paid out of the governmental funds of the Penobscot Nation.

6. Between April and September, 1994, the Penobscot Nation Tribal Council received complaints from tribal members about the medical treatment provided to elder members of the Tribe by Cynthia Fellencer, and

on September 6, 1994, the Tribal Council voted to terminate her employment at the Tribe.

Dated: 11/10/97 /s/ Mark Mitchell
Mark Mitchell

State of Maine
Penobscot, S.S.

Personally appeared the above-named Mark Mitchell, who stated, under oath, that the foregoing facts are true upon his personal knowledge before me,

Dated: 11/10/97 /s/ D. Lorraine Dana
Notary Public

OFFICIAL SEAL
D. Lorraine Dana
NOTARY PUBLIC – STATE OF MAINE
My commission expires November 20, 2002

AFFIDAVIT OF CARL G. MITCHELL

CARL G. MITCHELL deposes and states, under oath, as follows:

1. My name is Carl G. Mitchell. I am the Personnel Director for the Penobscot Nation. In that capacity, I oversee personnel matters pertaining to the Penobscot Nation.

2. I was Personnel Director for the Penobscot Nation at the time Cynthia Fellencer was employed as Community Health Nurse/Diabetes Coordinator at the Penobscot Nation Health Department.

3. The Penobscot Nation Health Department operates on the Penobscot Indian Reservation to provide health services to on-reservation members of the Penobscot Nation. Funds for the Penobscot Nation Health Department are provided to the Penobscot Nation by the United States Department of Health and Human Services, Indian Health Services, pursuant to the United States Indian Self-Determination Act.

4. In her position as Community Health Nurse/Diabetes Coordinator, Cynthia Fellencer treated sick and elderly members of the Tribe on the Penobscot Reservation.

5. On September 6, 1994, after receiving complaints from members of the Penobscot Nation about her treatment of the tribal members, the Penobscot Nation Tribal Council voted to terminate Cynthia Fellencer's employment, and she was discharged as a result of that decision on September 30, 1994

Dated: 11/19/97 /s/ Carl G. Mitchell
Carl G. Mitchell

Personally appeared the above-named Carl G. Mitchell, who stated, under oath, that the foregoing facts are true upon his personal knowledge, before me.

Dated: Nov. 19, 1997 /s/

D. Lorraine Dana
Notary Public

OFFICIAL SEAL
D. Lorraine Dana
NOTARY PUBLIC – STATE OF MAINE
My commission expires November 20, 2002

[PENOBSCOT NATION'S RESPONSES TO INTERROGATORIES PROPOUNDED BY PLAINTIFF (Fellencer v. Penobscot Nation, Maine Superior Court, Penobscot County, CV-95-275)]

The Penobscot Nation hereby responds to Plaintiff's Interrogatories as follows:

* * *

25. Describe in detail the comments made regarding Ms. Fellencer at the Tribal Council meeting of September 6, 1994. Identify the author and substance of each comment.

* * *

ANSWER TO INTERROATORY 25:

* * *

The Personnel Committee presented a Council Action Request to the Tribal Council, asking Tribal Council to issue a vote of No Confidence regarding Plaintiff's employment, to request her resignation effective in 2 weeks, and if she did not so resign, to terminate her employment. The Tribal Council duly approved the Personnel Committee's Council Action Request.

The Tribal Council received, as part of the Council Action Request, a letter dated 9/4/94 from Penobscot Nation tribal member, Barbara Daigle Francis (Power of Attorney for Esther Albert), setting forth complaints about Plaintiff's treatment of senior tribal member, Esther Albert and two letters, dated 3/5/94 and 4/1/94, from senior tribal member, Judy Cote, a diabetic, complaining about Plaintiff's treatment of her.

* * *

39. State when and how the Penobscot Nation's Department of Indian Health Services, or any predecessor department, was created, and describe any and all documents which discuss creation of the Department of Indian Health Services.

* * *

ANSWER TO INTERROGATORY 39:

* * *

The first contract was signed for Indian Health Services (IHS) in 1978. But one year prior to that, the Nation received a grant from IHS to study the health needs of its members at Indian Island.

See Documents attached.

40. State when and how the Indian Health Services Clinic on Indian Island, or any predecessor clinic, was established, and describe any and all documents which discuss creation of the Indian Health Services Clinic.

* * *

ANSWER TO INTERROGATORY 40:

* * *

See answer to Interrogatory 39.

41. Describe the organizational structure of the Department of Indian Health Services, including but not limited to the role of the Indian Health Services Clinic. Include with your response a complete staffing diagram for the department and clinic which lists the name of each

position, and the name of the persons who occupied each position as of September 27, 1994.

* * *

ANSWER TO INTERROGATORY 41:

* * *

The Penobscot Nation Health Department is a department of tribal government. The clinic was funded in 1994 under a subcontract between the Penobscot Nation and IHS pursuant to P.L. 93-638. It is currently funded by an IHS self-governance compact. Defendant has no such "staffing diagram." See also answer to Interrogatory 43.

42. State when and how the position of Community Health Nurse/Diabetes Program Coordinator was established, and describe any and all documents which discuss creation of the Community Health Nurse/Diabetes Program Coordinator.

* * *

ANSWER TO INTERROGATORY 42:

* * *

It was one of the original positions funded under the first IHS contract for the purpose of establishing the Penobscot Nation Health Department and it was filled by Penobscot tribal member, Ruth Davis, a registered nurse, after whom the Penobscot Nation Health Clinic is now named.

In the early 1980s, Indian Island was chosen by IHS as a model site for IHS diabetes program moneys. The

Diabetes Program was then set up and the coordinator position established.

* * *

Dated: 7-28-97

[Francis Mitchell]
Chief, Penobscot Nation

Personally appeared the above-named, Francis Mitchell, Chief, Penobscot Nation, who stated, under oath, that the foregoing responses are true upon his personal knowledge, information, or belief, before me,

Dated: 7-28-97

[Elizabeth J. Kimball]
Notary Public

CHARGE OF DISCRIMINATION
E94-0730
Maine Human Rights Commission

* * *

Ms. Cynthia A. Fellencer

* * *

Cause of Discrimination Based on:

XX Race XX National Origin XX Age

* * *

The Particulars Are:

I was employed by the Penobscot Tribal Nation as the Community Health Nurse/Diabetes Program Coordinator, from December 9, 1992 to September 30, 1994. The program I worked for is funded by federal contract No. 285-92-0001. On September 6, 1994, the Penobscot Tribal Council voted "no confidence" in me and the Director of the Health Program, Ms. Gail Dana-Sockabasin. Ms. Dana-Sockabasin is a Native American. On September 30, 1994, I was dismissed from my position. Ms. Dana-Sockabasin was not dismissed. As stated by Jerry Pardilla, then Governor of the Penobscot Nation, there was no objective basis for my discharge. I believe the only reasons I was dismissed was on the basis of my race or national origin, or age, in violation of state and federal law. The Penobscot Nation has advertised to fill my position giving preference to Native American applicants.

* * *

SIGNATURE OF COMPLAINANT

(Cynthia A. Fellencer)

Office of the Attorney General
State of Maine

Opinion No. 84-22

July 25, 1984

Patricia E. Ryan
Executive Director
Maine Human Rights Commission
State House Station #51
Augusta, Maine 04333

Dear Ms. Ryan:

This will respond to your letter of April 25, 1984 in which you request an Opinion of this Department as to whether the Maine Human Rights Commission has jurisdiction to investigate complaints of unlawful employment discrimination against the Penobscot Nation.[1] For the reasons discussed below, it is the Opinion of this Department that the employment decisions of the Penobscot Nation, when acting in its capacity as a tribal governmental employer, are not subject to regulation by the State, and, therefore, do not fall within the jurisdiction of the Maine Human Rights Commission.

On November 18, 1983, the Maine Human Rights Commission received a complaint of unlawful employment discrimination against the Penobscot Nation and its Tribal Governor, alleging that the complainant's employment with the Penobscot Nation had been terminated on the basis of her sex in violation of the Maine Human

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[1] For the reasons discussed below, the conclusions reached in this Opinion are equally applicable to the Passamaquoddy Tribe.

Rights Act. (5 M.R.S.A. §§ 4551, et seq.). More particularly, the complainant alleged that she had been employed by the Penobscot Nation as its Director of Employment and was fired from that position, because of her sex, by the Tribal Governor in a decision which was subsequently upheld by the Tribal Council. The Penobscot Nation, through its counsel, has previously stated its position to be that "[c]ivil rights disputes between employees of the tribe and the tribal government are internal tribal matters which are not subject to state regulation. . . . " pursuant to 30 M.R.S.A. § 6206(1).

It is now established that the relationship between the State of Maine and the Penobscot Nation is governed by the provisions of the Maine Indian Claims Settlement Act (30 M.R.S.A. §§ 6201-6214) which has been "approved, ratified, and confirmed" by the United States Congress. 25 U.S.C. §§ 1721(b)(3), 1725(b)(1). See Penobscot Nation v. Stilphen, 461 A.2d 478, 487 (Me. 1983), app. dis. 104 S.Ct. 323 (1983). The legislative findings and declaration of policy which became part of the Maine Act as 30 M.R.S.A. § 6202 recognize that the settlement was designed to resolve "far-reaching claims of various Maine Indians"[2] and "[t]o that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act." The general principle that state law will govern the relationship between Maine and the various Indians is more specifically articulated in 30 M.R.S.A. § 6204, which provides:

---

[2] Penobscot Nation v. Stiphen, 461 A.2d at 487.

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the state and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or land or other natural resources therein.

With specific reference to the powers and duties of the Penobscot Nation, 30 M.R.S.A. § 6206(1) provides, in pertinent part:

Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian Territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian Territory, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. (emphasis added).

In view of the foregoing, it seems apparent that a resolution of the question of whether the Maine Human Rights Commission has jurisdiction to investigate an allegation of unlawful employment discrimination against the Penobscot Nation turns on whether the employment

decisions of the Nation, when acting as a tribal governmental employer, are "internal tribal matters" within the meaning of 30 M.R.S.A. § 6206(1). It is the Opinion of this Department that such decisions are "internal tribal matters" and are, therefore, not subject to regulation by the State of Maine.

In Penobscot Nation v. Stilphen, 461 A.2d 478, 489 (Me. 1983), app. dismissed, 104 S.Ct. 323 (1983), the Maine Law Court held that the term "internal tribal matters" is to be construed by reference to the Maine Indian Settlement Act and its legislative history. In this connection, the Court noted that the term "internal tribal matters" is followed by an illustrative list of the types of matters, including tribal government, which are outside the reach of State regulation. The Court concluded that the term "embraces only those matters illustratively listed in the statute and other matters like them." 461 A.2d at 490. In reviewing the legislative history of the Maine Indian Settlement Acts, the Law Court held that the "internal tribal matters" exception to State jurisdiction was descriptive of those matters having unique cultural and historical importance to the Indians such that they should be free from State control. Id.

It is this Department's Opinion that the authority of the Penobscot Nation to control "tribal government" free of regulation by the State, necessarily includes within it the power to decide who will be an employee of the tribal government. It seems obvious that it is an integral component of tribal self-government to determine who will become an employee within the governmental structure of the Penobscot Nation. The legislative mandate that State regulation is not to extend to matters of tribal

government would become illusory if the Penobscot Nation, when acting in its capacity as a tribal governmental employer, is subject to the jurisdiction of the Maine Human Rights Commission. Subjecting employment decisions of the Penobscot Nation to the jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result clearly not intended by the Maine Indian Settlement Act. Accordingly, it is the Opinion of this Department that decisions of the Penobscot Nation, as to who will be employed by the tribal government, are "internal tribal matters" not subject to regulation by the State and, therefore, not within the jurisdiction of the Maine Human Rights Commission.[3]

I hope this information is helpful to you, and please feel free to call upon this office if we can be of further assistance.

Sincerely,
James E. Tierney

Attorney General

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[3] This conclusion is consistent with that reached by the Commission itself in a matter entitled Ranco v. Penobscot Nation, E81-0020 (November 15, 1982).